

EXHIBIT “A”

1

UNITED STATES BANKRUPTCY COURT

3 | SOUTHERN DISTRICT OF NEW YORK

4 Case No. 05-16167

6 | In the Matter of:

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EAST 44TH REALTY, LLC

6

10 Debtor.

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United States Bankruptcy Court

One Bowling Green

New York, NY 10004

15

18 March 10, 2006

19 10:12 AM

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21 | B E F O R E :

22 HON. ROBERT D. DRAIN

23 U.S. BANKRUPTCY JUDGE

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1 HEARING re Docket #70; Motion to Assume Lease

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Transcribed by: Lisa Bar-Leib

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2 A P P E A R A N C E S :

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23 BY: JUDY G.Z. LIU, ESQ.
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1 EAST 44TH REALTY, LLC

2 P R O C E E D I N G S

3 THE COURT: Please be seated. All
4 right. East 44th Street Realty.

5 MS. TRAKINSKI: Esther Trakinski,
6 Davidoff, Malito for the debtor.

7 MR. BACKENROTH: Abraham Backenroth
8 for the principal of the debtor.

9 MS. LIU: Judy Liu from Weil,
10 Gotshal for the landlord.

11 MR. TOFEL: Lawrence Tofel, Tofel &
12 Partners for the landlord.

13 THE COURT: Okay. I, obviously,
14 received, since the last time we were
15 here on the debtor's motion to assume the
16 lease and the landlord's objection
17 thereto, the citations to additional
18 cases that counsel for the landlord --
19 I'm sorry, the counsel for the debtor
20 said she wanted to submit. And I gave
21 her leave to submit, as well as the
22 response by the landlord to those
23 citations. I've also received some
24 additional materials, some of which I
25 wanted to receive, others that I didn't.

1 EAST 44TH REALTY, LLC
2 I received additional materials in
3 respect of the landlord's claim for
4 attorneys' fees. I had asked for time
5 records and the like. I got those. I
6 also got supporting affidavits by Mr.
7 Tofel in connection therewith. I also
8 received an affidavit from Mr. Tofel
9 regarding the landlord's attempts to
10 mitigate damages, which we had discussed
11 at the end of the hearing. I received
12 this morning a courtesy copy of a
13 response to that affidavit which I've
14 only very briefly looked at since I got
15 it this morning. And I have received
16 correspondence back and forth with
17 respect to the precondition that I had
18 set for Mr. Tofel's deposition, which was
19 that the debtor show me that in fact it
20 had sufficient funds to make me
21 comfortable that there was a reason to
22 proceed on this matter, since I believed
23 that there would have to be at least a
24 reserve in respect to the assumption
25 motion of, as I phrased it, a few hundred

1 EAST 44TH REALTY, LLC
2 thousand dollars. Originally, it struck
3 me that those representations were
4 inadequate. I subsequently received an
5 affidavit by the debtor's principal, Mr.
6 Yesef Bildirici in which he swore under
7 oath that the 300,000 dollars in the bank
8 account that was referred to in the
9 affidavit was (a) not the debtor's money
10 and (b) dedicated solely to payment of
11 cure costs and otherwise in connection
12 with assumption of the lease. That
13 happened only recently and I don't know
14 whether Mr. Tofel has been deposed and
15 where we stand at this point in terms of
16 any further adversary evidentiary matter
17 in this lease assumption matter. So
18 maybe the parties can inform me of that.

19 MR. TOFEL: If I can, Your Honor.
20 I have not been deposed yet, and let me
21 tell you exactly what the thought process
22 was from our side of the table, at least.

23 THE COURT: All right.

24 MR. TOFEL: We were aware of the
25 submission by Ms. Trakinski of a letter

1 EAST 44TH REALTY, LLC
2 indicating two different potential
3 sources of funding, one from an insider
4 of the debtor and one from a home equity
5 line. We also understood Your Honor to
6 request more.

7 THE COURT: Right.

8 MR. TOFEL: There were two issues
9 with respect to that. One, we did not
10 understand Your Honor to have identified
11 a number as Your Honor has observed was
12 several hundred or a few hundred thousand
13 dollars --

14 THE COURT: Right.

15 MR. TOFEL: And as we understand,
16 at least, the submission, the last
17 submission, the affidavit to which Your
18 Honor referred, it does say what Your
19 Honor said, but what it actually says is
20 the money is there only if and it's there
21 for the purposes that Your Honor
22 indicated, but only if Your Honor caps
23 the cure amount at 300,000 dollars or
24 less. Thus, a somewhat longer response
25 to we do not understand the Court yet to

1 EAST 44TH REALTY, LLC
2 have determined whether the debtor has
3 met Your Honor's inquiry or satisfied the
4 Court's concerns and, obviously, we need
5 some guidance on that. Obviously, we
6 believe the amount of 300,000 dollars not
7 only would be inadequate, but also
8 inconsistent with Your Honor's prior
9 rulings where Your Honor had said, I
10 think back in December, perhaps in
11 January, I don't want to see an arbitrary
12 cut-off which would not account for
13 expenditures in connection with these
14 processes and these hearings. But, so --
15 we need some guidance from Your Honor --

16 THE COURT: All right.

17 MR. TOFEL: --on that, but of
18 course that also presupposes the gating
19 issue, which is the termination issue.

20 THE COURT: Right.

21 MR. TOFEL: And then there are also
22 some things that have happened more
23 recently that I think Your Honor should
24 be aware of since the hearing, not with
25 respect to the filings, which we believe

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1 EAST 44TH REALTY, LLC

2 are further disregard of -- not only
3 disregard, but also direct violation of
4 this Court's prior orders.

5 THE COURT: All right. Well, in
6 respect to the affidavit, I certainly
7 recognize that I had left the amount
8 vague in saying a few hundred thousand
9 dollars. Partly, that was because I had
10 not had the chance to review the fee
11 information material that you
12 subsequently gave me, and that's really
13 particularly no one's fault. As I read
14 this affidavit, however, it doesn't limit
15 the amount that the debtor would pay as
16 cure. And as I read it, it says that the
17 full 300,000 dollars is there.

18 Obviously, they're not going to pay
19 300,000 dollars if I find the cure is
20 200,000 dollars. On the other hand, if I
21 find the cure is 350,000 dollars, they're
22 going to have to come up with another
23 50,000 dollars. And what I had in mind,
24 really, was simply having some assurance
25 that, based on the record of the prior

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2 hearing, the debtor in fact did have
3 sufficient funds to continue to proceed
4 in good faith. Because I believe that
5 given all the issues here, including the
6 issues regarding adequate assurance of
7 future performance, it would have to come
8 up with some real money. And, in my
9 view, and I'll get into this in more
10 detail later, having reviewed the fee and
11 expense submissions and having gone back
12 again and reviewed the law on attorneys'
13 fees in connection with a cure claim and
14 having again reviewed the lease
15 provisions dealing with attorneys' fees,
16 as well as Judge Diamond's order, for
17 purposes of, if you will, continuing on
18 with the motion and subjecting you to
19 discovery, I think the 300,000 dollars is
20 sufficient. That's not a ruling on what
21 the cure amount is but I didn't want to
22 create additional expense on your end if
23 the debtor didn't have a good faith
24 amount of money. So, that's how I view
25 the affidavit.

1 EAST 44TH REALTY, LLC

2 MR. TOFEL: That's fine. I just --
3 I think it would be helpful at least from
4 our perspective, and perhaps also from
5 the Court's -- again we read that
6 affidavit as saying that if Your Honor
7 were to rule, to use your hypothetical,
8 with the cure amount as 350, that there
9 could be conditions with respect to the
10 funds that are now in that bank account.
11 It would make those funds not available.

12 THE COURT: Well, I don't know --

13 MR. TOFEL: The affidavit is very
14 carefully written in terms of the money
15 is there and available, conditioned upon
16 or limited, if the Court were to find
17 that the amount were not to exceed.

18 MR. BACKENROTH: Your Honor, if I
19 can clarify.

20 THE COURT: I don't read it that
21 way, but why don't we have the debtor's
22 lawyer or Mr. Bildirici's lawyer --

23 MR. BACKENROTH: Yeah, but all it
24 says, basically, is that he's committed
25 the 300,000. It's there in escrow. If

1 EAST 44TH REALTY, LLC

2 Your Honor ruled fine and say, according
3 to your hypothetical, 350, then he'll
4 have a decision to make. That decision
5 is put up another 50,000 or walk away
6 from the assumption obligation. In other
7 words, he's committed 300,000, it's
8 sitting in escrow. If Your Honor rules
9 250, it's 250, he gets paid absolutely,
10 there's no issue, but if Your Honor rules
11 more than that, then it's a moment of
12 truth, so to speak. And he may lose the
13 lease --

14 THE COURT: Right.

15 MR. BACKENROTH: -- if he doesn't
16 put up the extra money. But that's our
17 good faith basically.

18 THE COURT: All right. Okay.

19 MS. TRAKINSKI: If I can just add
20 something from the debtor's perspective,
21 Your Honor, that language and the intent
22 of the language so that there is no
23 misunderstanding that those funds belong
24 to the equity shareholders, they are not
25 the debtor's funds and in the event Your

1 EAST 44TH REALTY, LLC

2 Honor rules that it's something less than
3 300,000, we want it to be perfectly clear
4 that those funds were not available to be
5 tapped for other obligations of the
6 debtor, other than the cure of the
7 attorneys' fees. And that's been purely
8 the intent.

9 THE COURT: All right. So, I think
10 everyone is in agreement that there is, I
11 suppose, some risk that a deposition of
12 Mr. Tofel and continued litigation of
13 this matter would be wasting everyone's
14 time, that is, if I find a greater cure
15 amount and/or need for adequate
16 assurance, and the shareholders decide
17 not to put it up. On the other hand,
18 300,000 is a lot more than I thought,
19 reasonably based on what I heard on the
20 last hearing on the record, that perhaps
21 the debtor was willing to pay, since
22 everything on the record in the last
23 hearing was trying to squeeze out every
24 possible cent through set-offs and the
25 like. And, again, as I said, I've

1 EAST 44TH REALTY, LLC
2 reviewed the cure claim in more detail
3 having received more detail, and I think
4 that is a good faith basis to continue.

5 Now, I am prepared to address the
6 issue of whether this is in fact an
7 unexpired lease or whether in fact it was
8 terminated pre-petition, but I guess
9 before I do that, Mr. Tofel, you said you
10 had something else that was relevant?

11 MR. TOFEL: Well, I know there are
12 facts that have occurred since we were
13 last before you that I think you should
14 know you will decide whether --

15 THE COURT: But they don't pertain
16 to this lease termination issue?

17 MR. TOFEL: They pertain to whether
18 the debtor's complied with prior orders
19 of this Court.

20 THE COURT: Okay. All right. But
21 not at -- there's not been a further
22 development, say, in the Appellate
23 Division or in front of Judge Diamond or
24 anything like that.

25 MR. TOFEL: No.

1 EAST 44TH REALTY, LLC

2 THE COURT: All right. All right.

3 So I probably ought to deal with, then,
4 what has been referred to from time to
5 time as the gating issue, which is the
6 issue of whether the debtor's lease,
7 which is essentially its only asset other
8 than its right to collect rent from the
9 tenants, terminated pre-petition or
10 perhaps, more specifically, and this is
11 how the landlord has phrased it, whether
12 the debtor lost the right to cure the
13 default and pre-petition.

14 This is because, obviously,
15 Section 365 of the Code applies only if
16 the lease is in existence at the
17 commencement of the case and has not
18 otherwise expired -- of course it's not
19 expired as it's a long term lease --
20 since the commencement of the case.

21 As Collier says at 3 Collier on
22 Bankruptcy, paragraph 365.02[2], if the
23 contract or lease has expired by its own
24 terms or has been terminated under
25 applicable law before the commencement of

1 EAST 44TH REALTY, LLC
2 the bankruptcy case, there is nothing
3 left for the trustee to assume or assign.
4 However, the termination process must
5 actually be completed and not be subject
6 to reversal, a determination that will
7 require reference to applicable state
8 law. As the parties may recall from the
9 last hearing, most of the last hearing
10 was dedicated to argument with respect to
11 whether the lapse of time between the
12 issuance of a decision and order by Judge
13 -- or Justice -- Diamond on February 24,
14 2005, lifting her Yellowstone injunction,
15 after which the landlord went through the
16 notice and termination procedure provided
17 for under the lease, which the landlord
18 contends resulted in an effective
19 termination on March 31, 2005, was
20 vitiated or mooted by the subsequent
21 issuance of a stay pending appeal by the
22 Appellate Division in an order dated May
23 6, I believe, of 2005. That stay by the
24 Appellate Division remained in place
25 through the date of the commencement of

1 EAST 44TH REALTY, LLC

2 this Chapter 11 case. Fairly early on in
3 the Chapter 11 case, the Court lifted the
4 automatic stay to permit the conclusion
5 of the litigation of the appeal in front
6 of the Appellate Division, but of course
7 not beyond the issuance of a decision by
8 the Appellate Division. That is, not to
9 the point of enforcement.

10 On December 15th, 2005, the
11 Appellate Division determined that the
12 substantive portion of Judge Diamond's --
13 Justice Diamond's, excuse me -- February
14 24, 2005 order should be upheld and that
15 in fact the debtor had an obligation to
16 cure the default in respect of the lease
17 which was the subject of her order. That
18 is, to make the repairs to the building.
19 It's, I believe, acknowledged by the
20 parties that those repairs and that work
21 have been substantially completed and
22 that to finish the work in the grand
23 scheme of this case would cost a
24 relatively small amount of money.

25 The Appellate Division's December

1 EAST 44TH REALTY, LLC
2 2005 order said nothing, as it would not
3 be expected of the Appellate Division to
4 say anything, regarding the issue before
5 me, which is, did its earlier May 2005
6 order effectively toll retroactively the
7 debtor's right to cure that default if,
8 as happened, the Appellate Division ruled
9 against the debtor on the merits in
10 respect of the existence of the default.
11 The landlord contends that no such right
12 to cure exists and, effectively, that the
13 stay was intended only to preserve the
14 lease if in fact the debtor prevailed and
15 convinced the Appellate Division that
16 there was no default and that Justice
17 Diamond was incorrect on the merits. On
18 the other hand, the debtor and its
19 principal contend that the Appellate
20 Division's stay had the effect of a
21 reinstatement of Yellowstone-like relief,
22 and that if the debtor did not prevail on
23 the merits of the appeal, there was
24 nothing to indicate that it would not be
25 able at that time to cure the default,

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2 which, of course it is proposing now to
3 do pursuant to Section 365, which permits
4 the cure of defaults of unexpired leases.

5 I asked for additional case law on
6 this issue and in reviewing that case law
7 as well as the procedural history in the
8 state court where, among other things, it
9 was argued to the Appellate Division that
10 the appeal itself was moot, according to
11 the landlord, for essentially the same
12 reasons that it's arguing to me that the
13 lease was terminated, and, therefore,
14 that the Appellate Division did not have
15 to decide any issue because of the lapse
16 of time between the termination of the
17 Yellowstone injunction by Justice Diamond
18 and the proposed imposition of the stay
19 by the Appellate Division. Obviously,
20 the Appellate Division determined to
21 continue with the appeal and not to
22 consider it moot.

23 I've also reviewed again the
24 specific injunction or stay issued by the
25 Appellate Division. It was argued simply

1 EAST 44TH REALTY, LLC
2 as a matter of semantics by the landlord
3 in its response to the additional cases
4 sent to me by the debtor that the debtor
5 had actually sought the reimposition of
6 the Yellowstone injunction and the
7 Appellate Division had instead imposed
8 merely a stay. I don't really see that
9 level of analysis in the Appellate
10 Division's order, which says "an appeal
11 having been taken to this Court from the
12 order of the Supreme Court on or about
13 February 28, 2005, and
14 plaintiff/appellant having moved pursuant
15 to CPLR 5518 and CPLR 5519(c) for a
16 preliminary appellate injunction, inter
17 alia enjoining respondent from commencing
18 any action or proceeding to recover
19 possession of the premises, located at
20 228-3 230-80s 44th Street, New York, New
21 York, interfering with appellant's use
22 occupancy and possession of the premises,
23 including appellant's relation with its
24 tenants and staying proceedings with
25 respect to respondent's counterclaims all

1 EAST 44TH REALTY, LLC
2 pending hearing and determination of this
3 appeal and for related relief and
4 defendant having responded and having
5 cross-moved for dismissal of the
6 aforesaid appeal or, in the alternative,
7 for an order fixing an undertaking, that
8 the motion for a stay is granted upon the
9 terms and conditions contained in the
10 order of a justice of this Court dated
11 May 6, 2005, which required, among other
12 things, payment and continued payment of
13 the rent, and upon the further condition
14 that plaintiff perfects the appeal for
15 the October 2005 term."

16 Based on my review of that order,
17 it appears to me that what was indeed at
18 issue in the motion for an appellate
19 injunction was the debtor's continued
20 right to possession of the premises and
21 from that flowed all of its other rights,
22 including the right to collect rent. And
23 that that is what the Appellate Division
24 preserved and that was what was at the
25 start of this case still preserved.

23

1 EAST 44TH REALTY, LLC
2 That's certainly consistent with
3 the logic of a Yellowstone injunction,
4 which is clearly intended to stay the
5 tolling -- stay or toll the running of
6 the cure period, so that after a
7 determination of the merits of a dispute,
8 the tenant may cure the defect, if any is
9 found on the merits, and avoid a
10 forfeiture of the lease. As Judge
11 Diamond herself found in her October 14,
12 2005 order issuing a Yellowstone or
13 Yellowstone-type injunction for the
14 benefit of the lease mortgage holder
15 here, the courts are not specifically
16 limited to the fact pattern of the
17 Yellowstone case. Indeed, the Appellate
18 Division, First Department, issued
19 Yellowstone-like relief in the form of a
20 preliminary injunction to avoid
21 forfeiture pending determination of
22 default issues on the merits in Empire
23 State Building Association v. Trump
24 Empire State Partner, 667 N.Y.S.2d 31,
25 1st Dept 1997.

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2 So, given the inescapable fact that
3 the Appellate Division did enter such
4 relief in the form of its stay, and was
5 fully aware of the expiration of time
6 between -- or the running of time between
7 Justice Diamond's order terminating the
8 Yellowstone injunction and the request
9 for a stay of the -- by the debtor at the
10 Appellate Division, I conclude that's
11 what was intended by the Appellate
12 Division.

13 As a matter of law, that may well
14 be something I can't review under the
15 Rooker-Feldman doctrine or related
16 principles of collateral estoppel and res
17 judicata. But, in any event, it does
18 appear to me consistent with the law as
19 set forth in the main case that we had
20 discussed at the prior hearing, which I
21 continue to believe is the leading case
22 in this area: Mann Theaters Corporation
23 of California v. Mid-Island Shopping
24 Plaza Company, 464 N.Y.S.2d, 793, 2nd
25 Dept, 1983, affirmed, 62 NY 2d 930, 1983.

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2 I recognize, as I had recognized at
3 the earlier hearing, that there are cases
4 where at least in the context of a, not a
5 previously issued Yellowstone injunction,
6 but the expiration of a TRO, courts would
7 not reinstate or retroactively impose,
8 more appropriately, a Yellowstone
9 injunction. That certainly was the
10 result in *TW Dress Corporation v.*
11 *Kaufman*, 553 N.Y.S.2d 548, 2nd Dept.,
12 1988. But, since it is ultimately an
13 equitable remedy that can, in my view
14 under the case law, be revived at least
15 if there was a previously issued
16 Yellowstone injunction during an appeal,
17 I think that it was up to the Appellate
18 Division to determine when it issued its
19 stay, whether in fact the debtor should
20 be estopped from attempting to revive
21 such a right because of inactivity, or
22 the like, that was inequitable or
23 inappropriate. And the Appellate
24 Division did not do that. Instead it
25 issued its stay.

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2 So, it appears to me that, again,
3 what the Appellate Division did was with
4 knowledge of the background here, because
5 the landlord made its arguments very
6 plain to the Appellate Division that it
7 believed the lease had already
8 terminated, the Appellate Division, to
9 the contrary, continued the stay pending
10 determination of the merits and that
11 consequently the tenant, having lost on
12 the merits, should be given a right to
13 cure, which the Bankruptcy Code, of
14 course, expressly recognizes under
15 Section 365.

16 So, in my view, there is a lease
17 extant that can be assumed. Now, in
18 terms of the requirements for assumption
19 and assignment, we had testimony by Mr.
20 Bildirici with regard to adequate
21 assurance of future performance. We
22 hadn't closed the record, however, on the
23 issue of assumption and assignment, and,
24 to my mind, the landlord still has an
25 opportunity to present contrary evidence

1 EAST 44TH REALTY, LLC
2 with regard to adequate assurance, and
3 although I believe, with respect to
4 adequate assurance, the debtor had
5 concluded it obviously has the right to
6 rebut any evidence the landlord wants to
7 submit. On that score, Mr. Tofel or Weil
8 Gotshal, I forget which, have provided in
9 addition to the other materials that it
10 provided to me after the last hearing a
11 critique of Mr. Bildirici's affidavit and
12 testimony with regard to adequate
13 assurance. To some extent, I think that
14 critique offered items of evidence as
15 well, but I think I'm capable of sifting
16 through and determining what was a
17 critique and what was not. In addition
18 to having a right, however, as a factual
19 matter, to submit evidence in respect of
20 adequate assurance, the landlord -- I'm
21 sorry -- the landlord has also asserted
22 almost a million dollar cure claim in
23 respect of attorneys' fees over and above
24 the what I refer to as relatively small
25 amount actually needed to cure the repair

1 EAST 44TH REALTY, LLC
2 default. And I recognize that amount has
3 not been agreed to expressly, but that's
4 -- the million dollar attorneys' fees are
5 on top of that cure amount. I had said
6 that the landlord needed to provide time
7 records in respect of the attorneys' fees
8 cure claim, which it did, although I
9 don't believe it provided them to the
10 debtor under claims of privilege, saying
11 that they would have to be so heavily
12 redacted, in effect, that there was no
13 reason to provide them, other than just
14 the flat bills without the time records,
15 to the other side. And the amount at
16 issue is so large that I had some real
17 doubts that there could be simply a
18 reserve to cover that issue pending a
19 further hearing in regard to the
20 attorneys' fees, which is why, among
21 other things, I requested that the -- why
22 I required that the debtor at least put
23 up a few hundred thousand dollars pending
24 further discovery in respect of those
25 fees.

1 EAST 44TH REALTY, LLC

2 So, that's where we stand at this
3 point. I can have a hearing on the cure
4 claim as part of the lease assumption
5 motion. And, again, I don't know whether
6 the landlord wants to submit evidence on
7 the adequate assurance issue or not, but
8 I also would have a hearing on that, too.
9 But, it seems to me on both of those
10 points, at least in respect of the cure
11 point, there needs to be some additional
12 discovery.

13 MS. LIU: I guess I have a
14 question, Your Honor. We did submit what
15 I'll call the projections affidavit, just
16 for ease of reference --

17 THE COURT: Right. If you don't
18 want to submit additional evidence on the
19 adequate assurance point, I'm not telling
20 you to do it. I think that --

21 MS. LIU: No, I understand that you
22 are saying we can if we'd like.

23 THE COURT: Right.

24 MS. LIU: I guess I was just
25 puzzled, though, at your comment about it

1 EAST 44TH REALTY, LLC

2 being a critique. It says what it says.

3 It's just trying to show you that -- and
4 I'll point out it was not responded to.

5 It's an uncontroverted affidavit.

6 THE COURT: Well, it's not
7 something I asked to have be submitted,
8 so I wouldn't expect anyone to respond to
9 it.

10 MS. LIU: Okay. Well, that's a
11 fair comment, but the reason we -- I'll
12 just offer my explanation of why it was
13 submitted, and that's because that was at
14 the end of the hearing and Your Honor had
15 to get to another hearing, and we thought
16 that it might be difficult for you to
17 follow the transcript of that portion.
18 And so, it was an attempt to just write
19 it down for you.

20 THE COURT: All right. That's
21 fine.

22 MS. LIU: And, similarly -- okay.
23 Well, that was the explanation.

24 THE COURT: To the extent that --
25 and I don't think it's replete with

1 EAST 44TH REALTY, LLC
2 factual assertions, as opposed to
3 commentary on Mr. Bildirici's factual
4 assertions, but to the extent there are
5 factual assertions in the affidavit, I
6 took it as the opening shot, if you will,
7 in the landlord's factual showing on
8 adequate assurance and, of course, the
9 debtor would be entitled to cross-examine
10 Mr. Tofel on those factual assertions.

11 Now, there are not a lot of them in
12 there. It's mostly again commentary on
13 his -- on Mr. Bildirici's testimony. But
14 I didn't know, having seen that, whether
15 the landlord actually wanted to have its
16 own factual record, as well, or would
17 simply rely on a critique without
18 additional factual assertions of what the
19 debtor put in the record on adequate
20 assurance.

21 MR. TOFEL: Let me rise with a
22 question which I recognize is somewhat
23 out of the ordinary. We have commented,
24 and I don't want to put a label on it --

25 THE COURT: Right.

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2 MR. TOFEL: -- but we've commented
3 on, for example, the debtor has submitted
4 projections showing a certain rental
5 revenue string.

6 THE COURT: Right.

7 MR. TOFEL: I don't know whether
8 Your Honor takes that as critique,
9 factual presentation --

10 THE COURT: Well --

11 MR. TOFEL: I want to give Your
12 Honor what you want. I want to give it
13 to you in the form that you want it.

14 THE COURT: All right. Well, there
15 are statements in the affidavit that X
16 percent of the leases are going to expire
17 by a date certain and others won't and
18 you won't be able to raise the rents
19 because the ones that aren't expiring are
20 going to continue. If that's in the
21 record already somewhere, you don't have
22 to show me that, but if it's not in the
23 record, you're going to have to show me.
24 Unless you're happy with the sort of
25 vague answer that Mr. Bildirici said

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2 which is that some of them will not
3 expire. So, there are things like that.
4 I mean, you just have to go through it
5 and see what are things that are not in
6 the record yet, and what are things that
7 are.

8 MR. TOFEL: I guess, the concern
9 I've got and the question that I'm
10 raising is we don't view the debtor as
11 having put forth the facts. They put
12 forth conclusions.

13 THE COURT: Well, I understand, but
14 all I'm saying is to the extent you are
15 putting forth facts, if it's in the form
16 of an affidavit (a) they have an
17 opportunity to cross-examine you and (b)
18 I think as per the last hearing, they
19 have an opportunity to take your
20 deposition. That's all.

21 MR. TOFEL: Very well. We
22 understand Your Honor's comments. Thank
23 you.

24 THE COURT: Okay.

25 MS. TRAKINSKI: May I just address

1 EAST 44TH REALTY, LLC

2 that, Your Honor?

3 THE COURT: Yes.

4 MS. TRAKINSKI: You're absolutely
5 right. One of the reasons we put no
6 response in to that portion of their
7 submission was the fact that we're still
8 waiting for the opportunity to depose Mr.
9 -- or Mr. Tofel.

10 THE COURT: All right. And again,
11 I don't fault the landlord for not making
12 him available yet. I think there was
13 enough ambiguity and tha, that's fine.

14 MS. TRAKINSKI: Is Your Honor
15 prepared to address the issue of
16 disclosure of the time records because
17 without them, frankly, we're lost.

18 THE COURT: Yes, I am. I want to -
19 - first of all, I think it's fair, since
20 this has clearly involved enough legal
21 hours already, to give you all some
22 preliminary guidance on the standard by
23 which I believe the aspect of the cure
24 that the landlord asserts is attributable
25 to attorneys' fees should be reviewed by

1 EAST 44TH REALTY, LLC

2 me.

3 As I see it, it's a three-step
4 analysis and it's laid out well, or at
5 least clearly enough, in three Southern
6 District cases and well discussed in a
7 Delaware case.

8 The first step is to review the
9 actual provisions of the lease that
10 provide for attorneys' fees, because
11 without such provisions a landlord would
12 not have a right to attorneys' fees in
13 connection with either a claim under 502
14 or here, a cure claim under Section
15 365(b) (1) (B).

16 And I've done that and there
17 clearly are three provisions that are
18 applicable here. Paragraphs 12 and 26 of
19 the lease speak to attorneys' fees
20 generally in connection with enforcing
21 rights under the lease in respect of the
22 default. And paragraph 13, if I needed
23 it, addresses a right to fees in respect
24 to the Yellowstone injunction litigation
25 which Justice Diamond awarded anyway, to

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2 the extent they were reasonable, in her
3 decision. She didn't award a specific
4 amount of fees. She said that the
5 landlord would be entitled to reasonable
6 fees. But, as the courts have been
7 clear, that's the first step in the
8 analysis.

9 The second step involves a bit more
10 of the exercise of judgment on my part
11 and leaves, some open area for dispute,
12 obviously, which is that the cases have
13 been careful to make a distinction in
14 connection with landlord claims for
15 attorneys' fees as to whether they are
16 claims for actions undertaken by the
17 landlord to enforce rights under the
18 lease in a manner consistent with Section
19 365, for which they'd be compensable, or
20 whether they're or they were incurred in
21 connection with contesting the debtor's
22 rights generally under the Bankruptcy
23 Code, for which they're not compensable.
24 On the outer edges this is a pretty easy
25 distinction to make when landlords seek

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2 to compel assumption or rejection; for
3 example, for termination of exclusivity
4 or dismissal of the case for bad faith or
5 the like, the courts have been pretty
6 quick to find that those are not
7 appropriate cure claim rights, incur
8 claims under leases that have similar
9 language to the language here. On the
10 other hand, where the landlord is
11 realistically and reasonably in doubt as
12 to whether it will be paid its rent and
13 seeks to enforce its right to be paid
14 rent, then that is part of the cure
15 claim, clearly.

16 Intermediate steps are a little
17 more difficult. For example, in the
18 Delaware case I mentioned -- I'll give
19 you all the cites on this at the end --
20 where the right to attorneys' fees itself
21 in connection with asserting a cure claim
22 for attorneys' fees was a matter of first
23 impression, Judge Walrath found that
24 there was a basis to provide for some
25 attorneys' fees in that area, because the

1 EAST 44TH REALTY, LLC
2 law was not clear and of course
3 attorneys' fees themselves were a part of
4 the lease.

5 The third step of the analysis is
6 to determine whether the fees were
7 reasonable. And the courts again are
8 clear that this is not a simple lodestar
9 analysis where you look at the work done
10 and the normal fee requested, but have to
11 factor in other factors, including the
12 amount of the dispute relative to the
13 attorneys' fees requested, the debtor's
14 good faith to resolve the amount at
15 issue, the debtor's compliance with the
16 Code and whether the issue is a matter of
17 first impression. Judge Beatty in the
18 Nicfur-Cruz Realty Corporation case
19 boiled it down ultimately to whether in
20 addition to the lodestar factors, the
21 services were necessary to accomplish the
22 appropriate end that was sought and she
23 found that a substantial disproportion of
24 the fees sought to the amounts involved
25 in conjunction with the clear rights,

1 EAST 44TH REALTY, LLC
2 powers and privileges afforded the debtor
3 by the Bankruptcy Code would result in
4 limitations of an attorneys' fees claim
5 even if it was otherwise provided for
6 under the parties' agreement, because it
7 was not reasonable.

8 Anyway, let me give you the cases
9 that discuss this in addition to In re
10 Nicfur-Cruz Realty Corporation, which is
11 50 BR 162 Bankruptcy S.D.N.Y. 1985, which
12 really focuses on the reasonableness
13 analysis, and that is the third prong of
14 the analysis.

15 I've been relying heavily on a
16 summary and analysis of the case law in
17 this area by Judge Walrath in In re Crown
18 Books Corporation, 269 BR 12 Bankruptcy
19 District Delaware 2001, where she also
20 applies the same point that Judge Beatty
21 did in Nicfur-Cruz with regard to fees
22 substantially in excess of the amount in
23 dispute.

24 In addition, Judge Sweet in Loews
25 Cineplex Entertainment Corporation at 202

40

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2 Westlaw 535479 S.D.N.Y. April 9, 2002,
3 discusses the distinction between issues
4 based on the landlord's right to collect
5 amounts due under its bargained-for lease
6 and otherwise to enforce its rights under
7 the lease. In contrast to cases that did
8 not allow fees where the landlord was
9 dealing with bankruptcy-related issues,
10 contrary to bankruptcy rights that the
11 debtor had, such as to generally assume
12 or reject, maintain the exclusive period,
13 extend the time to assume or reject and
14 the like, Judge Sweet cites the cases
15 there that I've also reviewed but, in
16 particular, Judge Brozman's case In re
17 Best Products Company, 148 BR 413
18 Bankruptcy S.D.N.Y. 1992 appears to me to
19 be relevant in that there, a lot of time
20 was spent in essence seeking to terminate
21 the lease.

22 Then, finally, the case of In re
23 Child World, Inc., 161 BR 349 Bankruptcy
24 Southern District New York 1993.

25 In light of those cases, I think

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2 it's important to review the time records
3 in detail, particularly those for the
4 post-petition period. I really have
5 little, if any, problem with the pre-
6 petition time records of landlord/tenant
7 counsel. But as you can see from my
8 going through the three-step analysis in
9 regard to the cure claim, the post-
10 petition time, which, as I took it was
11 all the time in this case of Weil Gotshal,
12 and Mr. Tofel's really does require
13 parsing through because there's been a
14 lot of activity in this case, much of
15 which may not be compensable under the
16 standard that I've just described, that
17 is the second prong of the standard,
18 leaving aside the reasonableness issue.

19 I also think that there's another
20 issue with regard to Mr. Tofel's time on
21 the reasonableness point, which is that
22 normally the Courts are sensitive to
23 duplication of effort by counsel, and
24 he's very effective and Ms. Liu and Weil
25 Gotshal are very effective, but it's not

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2 clear to me that a cure claim should
3 cover both of them. And that's
4 particularly the case if Mr. Tofel has
5 really been acting largely as the client
6 and if that's why he was needed to be
7 here to assist Ms. Liu. So in weighing
8 the request -- well, I took it as a
9 request, although it was stated as a fact
10 -- that the landlord was not going to
11 provide its time records to the tenant
12 debtor, I believe, because of attorney
13 client privilege, I believe that those
14 records are essential to deciding this
15 issue. And while obviously I'm sensitive
16 to the attorney client privilege, I think
17 that a blanket withholding of those
18 records is outweighed by the materiality
19 of the issues that I've just gone through
20 and the prejudice to the debtor.

21 MS. LIU: Could I just comment on
22 that?

23 THE COURT: Yeah.

24 MS. LIU: The reason that at least
25 in the first instance they weren't

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2 provided was simply this. We thought
3 that Your Honor, based on the principles
4 you just enunciated, was going to look
5 through them and apply those principles
6 and make the decision yourself because
7 you're the Court.

8 THE COURT: Well --

9 MS. LIU: Well, hold on. I'm
10 explaining.

11 THE COURT: Okay.

12 MS. LIU: And the reason is because
13 it's been the debtor's position, almost
14 like a foregone conclusion, that none of
15 the fees are reasonable. So, we thought
16 that that would be a kind of a futile
17 exercise. But we're prepared to, of
18 course --

19 THE COURT: Well, I understand, but
20 I have to assume, and if I'm wrong about
21 this assumption, it'll probably come back
22 to bite them when their own fees are
23 reviewed, that in addition to making any
24 blanket objection, which is easily made
25 in one sentence and shouldn't take a lot

1 EAST 44TH REALTY, LLC
2 of time and shouldn't result in a lot of
3 expense being incurred by the estate,
4 that they'll make the proper objection
5 based on the more nuanced analysis that's
6 required. And I can't preclude them from
7 doing that. I'm not some form of -- it's
8 an adversary system; I can't decide it
9 without giving them the chance to review
10 it.

11 Again, I don't fault you for doing
12 it this way because as far as you knew,
13 it would all be moot, so why waive the
14 attorney client privilege if this issue
15 never is going to come up anyway?

16 MS. LIU: That's right, Your Honor.

17 THE COURT: So, I don't fault you
18 for that. But I think at this point,
19 however, they are entitled to review
20 them.

21 MS. LIU: And we -- of course we
22 would then do that but we would of course
23 want to just take a look at them and
24 redact anything that we think it's
25 appropriate. But also in connection with

1 EAST 44TH REALTY, LLC
2 this, you know, I need, I think, a little
3 guidance on this. We did submit an
4 affidavit that talked about I guess what
5 you referred to as the mitigation, you
6 know, the settlement efforts.

7 THE COURT: Right.

8 MS. LIU: And is Your Honor going
9 to factor that into your review? Because
10 that's why we submitted it.

11 THE COURT: Yes. Unfortunately, it
12 is an element in the cases. I mean, it's
13 something that Judge Beatty went through,
14 for example, in Nicfur. And I know that
15 there was an attorneys' affidavit
16 submitted in response this morning which
17 I just really skimmed through. I didn't
18 really pay much attention to it. In my
19 view, if this can't be resolved that's
20 also an issue that I probably need to
21 hear cross-examination on.

22 MR. TOFEL: The fact or observation
23 that Your Honor made as a matter of fact.
24 It's not correct and Your Honor is
25 misunderstanding whether the claim that

1 EAST 44TH REALTY, LLC

2 the landlord's attorneys' fees, at least
3 as concerns my firm's time, are all in
4 the post-petition period.

5 THE COURT: Oh, I know they're not.
6 No, I'm saying the post-petition part of
7 your firm's time

8 MR. TOFEL: Okay.

9 THE COURT: That's what I'm
10 referring to. When you're acting as --
11 as long as you're not acting,
12 effectively, as the client in the pre-
13 petition time, again, the pre-petition
14 time I don't really have much of a
15 problem with, except on that one point,
16 which is -- you know, is this something
17 that you -- I don't really know -- I've
18 been told you're the managing agent for
19 the client. I don't know if that's true.
20 That may be an issue. But that's, as far
21 as I can see, the only issue.

22 MR. TOFEL: My affidavits say that
23 I am the manager of the landlord. That
24 is, in fact, correct.

25 THE COURT: Well, see, but I don't

1 EAST 44TH REALTY, LLC

2 know what that -- I don't know whether
3 you separately bill people for -- that's
4 a separate issue.

5 MS. TRAKINSKI: Well, that's part
6 of the whole discovery process, Judge.

7 THE COURT: Exactly. That's part
8 of the discovery process.

9 MR. TOFEL: Let me deal with just
10 something else, and that is, what I would
11 propose and I don't know if Your Honor
12 has, frankly, concluded the rulings that
13 Your Honor wishes to impart today.

14 THE COURT: Well the thing on
15 attorneys' fees is just some guidance to
16 you.

17 MR. TOFEL: No, no, I appreciate
18 that. And I understand Your Honor's
19 rulings before and, obviously, you
20 recognize with them, respectfully, there
21 obviously are some things that are now
22 going to go forward. I take Your Honor's
23 comments to require us to deliver time
24 records and we will deliver time records.
25 We will go through them and redact the

1 EAST 44TH REALTY, LLC
2 things that we are most particularly
3 concerned about and deliver records to
4 counsel. But I just want to make sure
5 that we understand each other. Your
6 Honor includes anything for which we seek
7 reimbursement. That is correct.

8 THE COURT: That's right.

9 MR. TOFEL: Okay.

10 MS. TRAKINSKI: Judge, may I --

11 THE COURT: He's not finished yet.

12 MS. TRAKINSKI: -- the timing of
13 this should be only be the post-petition
14 one?

15 MR. TOFEL: Well, that's what I
16 think -- I think that's what he's not
17 saying. He's not saying it's post-
18 petition.

19 THE COURT: No, you should provide
20 them all. I can tell you that if there
21 was a privilege issue with regard to your
22 landlord/tenant firm, I would be -- you
23 redact and they say they shouldn't be
24 redacting this much, when I review it in
25 camera, I'll probably be more sensitive

1 EAST 44TH REALTY, LLC
2 to your point than their point. But the
3 balance kind of flips for the post-
4 petition period. And the separate issue
5 as to your role as managing agent and
6 attorney for the pre-petition period,
7 that was the basis for my distinction.
8 But they're entitled to all the time
9 records.

10 MR. TOFEL: Okay.

11 MS. TRAKINSKI: Judge, can I
12 address the redaction issue?

13 THE COURT: Yes.

14 MS. TRAKINSKI: In re Pine 50
15 speaks very clearly about the add issue
16 waiver here. It's our position that the
17 redaction in and of itself is
18 inappropriate and anything they're
19 redacting, they're not entitled to claim.
20 If they're claiming fees for a
21 conversation, for example, we're entitled
22 to know what the subject of that
23 conversation was. It's going to be very
24 difficult for us to probe the
25 reasonableness, particularly of the post-

1 EAST 44TH REALTY, LLC
2 petition period, as you point out,
3 because we've got this dichotomy of Mr.
4 Tofel's role.

5 THE COURT: Well, all right. I can
6 deal with that --

7 MS. TRAKINSKI: And, by the way,
8 Judge, just if I may, I'm sorry. The
9 dichotomy of roles applies to the pre-
10 petition period as well because Mr. Tofel
11 was acting as the manager.

12 THE COURT: No, I already said
13 that. I've already addressed that. It
14 does, I agree.

15 MS. TRAKINSKI: The redaction issue
16 is a real problem and I'm not sure that
17 we can adequately depose him if we --

18 THE COURT: Well, if -- I don't
19 know how much they're going to redact.
20 If it becomes an issue, then you can
21 raise it.

22 MS. LIU: Yeah, Your Honor, I would
23 like to just comment.

24 MR. BACKENROTH: Your Honor, if I
25 can have a word, as well.

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2 THE COURT: Well, I think Ms. Liu
3 was next.

4 MS. LIU: I would like to just
5 comment that redaction is pretty standard
6 procedure when attorneys' fees are
7 submitted in bankruptcy cases --

8 THE COURT: I agree. I agree. I
9 think it's something that people can use
10 their judgment on. If you have cases
11 that you want to give to Ms. Liu, that's
12 fine and she can use her judgment on it.
13 And if there's still a disagreement, I'll
14 resolve that.

15 MS. TRAKINSKI: I'm reminded
16 there's one other issue with respect to
17 at least the bills that are attached to
18 Mr. Tofel's affidavit. I don't know what
19 Your Honor received in terms of the
20 actual time records, but they've only
21 submitted bills with his affidavit. We
22 understand there are fees they've not
23 even been paid for. There's a
24 substantial amount of fees from what we
25 can tell that they've already been

1 EAST 44TH REALTY, LLC

2 reimbursed for and used Mr. Tofel's --

3 THE COURT: All right. Well,
4 that's a separate issue which you can --
5 you can take up in discovery.

6 MS. TRAKINSKI: But I want to make
7 sure that the order is clear that what
8 they have to turn over to us in terms of
9 time records is every single dollar
10 they're claiming was spent on this and
11 that they're claiming and they can't --

12 MS. LIU: Your Honor, that's not
13 correct.

14 MS. TRAKINSKI: Judy, can I please
15 finish? I've been respectful.

16 THE COURT: There's no order.
17 That's part of the -- I mean that's what
18 you can ask Mr. Tofel on discovery.

19 MR. BACKENROTH: Your Honor, if I
20 may --

21 THE COURT: There's no order. I'm
22 not issuing an order today. That's all
23 I'm saying.

24 MS. TRAKINSKI: We may come back to
25 you for one later on.

1 EAST 44TH REALTY, LLC

2 THE COURT: All right. But I would
3 assume that if there's an actual issue as
4 to what the landlord's been paid or not,
5 they're going to have to show that. I
6 mean, you can't submit a claim unless --
7 if there's a legitimate dispute as to
8 whether the claim has been paid or not,
9 that's a fair game for discovery.

10 MR. BACKENROTH: Your Honor, if --

11 MS. LIU: And, Your Honor, what's
12 at issue is the cure amount which by
13 definition means --

14 THE COURT: Unpaid.

15 MS. LIU: -- it's the unpaid
16 amount.

17 MR. BACKENROTH: No, it's a little
18 bit more than that because if for
19 argument's sake, the claim can be a
20 million three of which three hundred
21 thousand they've been paid, when we talk
22 about the analysis between what it is and
23 what they intended to cure --

24 THE COURT: No, you can ask Mr.
25 Tofel what he's been paid, that's fine.

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2 MR. BACKENROTH: And we can also
3 ask for the time sheets as to what he's
4 been paid, as well, because it comes to
5 the reasonableness of the total fees that
6 have been requested. And what he has
7 been paid towards that and whether or not
8 how much more has to be paid towards that
9 activity, so I think breaking it off of
10 at that point does not allow us to
11 present a full picture to Your Honor.

12 I was going to suggest yet
13 something in addition that I think would
14 be helpful in order to get the ball
15 rolling. And I mean that what I would
16 like to see from the landlord's counsel
17 as one would have in a fee application
18 presented to this Court a breakdown of
19 their time and the allocations into his
20 portions, so that we can take a look at -
21 -

22 THE COURT: No, they don't have to
23 do that. I don't think they have to do
24 that under this standard. This isn't
25 503(b), this isn't --I don't think this

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2 is covered by the Fee and Expense

3 Guidelines like that.

4 MR. BACKENROTH: It's not for the
5 purpose of the guidelines. It's for the
6 purpose of trying to calculate certain
7 services, whether or not they are
8 compensable. Otherwise we'll have to do
9 it if Your Honor -- we'll do that if we
10 have to do that.

11 THE COURT: You know, I know it
12 will be helpful to me but I think it's up
13 to them whether they want to do that or
14 not.

15 MR. BACKENROTH: Fine. We'll ask
16 for our discovery.

17 THE COURT: I mean, there's a risk
18 in not doing it as much as in doing it.
19 Because there's bound to be some level
20 of, as Judge Walrath said in her case,
21 she did the best she could in determining
22 what was reasonable in looking at a stack
23 of things. And if it's not broken down
24 in manageable chunks of time, it's easier
25 to make a mistake one way or the other.

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2 But it's not really a mistake because
3 you're just acting -- in essence you're
4 acting as an objective person who says
5 what's reasonable or not and --

6 MR. BACKENROTH: Then, Your Honor,
7 we'll go about doing that as part of our
8 discovery then.

9 THE COURT: Okay. All right.

10 MR. TOFEL: Let me deal with a
11 couple of items that I alluded to earlier
12 that now impact or are impacted by Your
13 Honor's determinations this morning.

14 THE COURT: Okay.

15 MR. TOFEL: Most specifically, and
16 let me deal with them in discrete
17 modules, if I can, Your Honor has
18 commented on whether to offer the
19 landlord opportunity, if we will, to put
20 in factual presentations, as opposed to,
21 I guess, what Your Honor described as a
22 critique, and I don't -- there's no
23 pejorative in there. I understand I'm
24 just trying to give labels. One of the
25 things that would enable us to do that,

1 EAST 44TH REALTY, LLC
2 and Your Honor heard a lot at the
3 beginning of this case about our request
4 for and we had worked for, literally, a
5 year to get and with Your Honor's help,
6 we finally did get some, but not all of,
7 the subleases. We clearly have some.
8 What I would ask Your Honor today to
9 direct the debtor to do is take the
10 whatever date upon which they last
11 delivered subleases to us, I accept them,
12 I think they represented at the time that
13 we had all that they had at that point.
14 What I would ask them, in short order, is
15 to deliver to us any leases that have
16 either incepted since that point going
17 forward or any leases that have come up
18 for a renewal at that point. So that,
19 between that delivery and the prior
20 deliveries we have --

21 THE COURT: All right. If I don't
22 see it that's fine, right? You can do
23 that, can't you?

24 MR. BACKENROTH: Yeah, within some
25 reasonable time we'll put it together.

1 EAST 44TH REALTY, LLC
2 THE COURT: All right. Okay.
3 MR. TOFEL: Secondly, the -- I
4 referred to earlier some events that have
5 transpired since we were here last. Let
6 me deal with one in particular, and Your
7 Honor has now heard numerous times about
8 insurance issues. As Your Honor will
9 recall back in December, Your Honor
10 issued a directive shortly before the
11 holiday right after the Appellate
12 Division had issued a decision where you
13 made it very clear and directed the
14 debtor to reimburse the landlord for its
15 insurance. At that point and at
16 subsequent points, Mr. Graham had come to
17 court and complained that we were not
18 cooperating in enabling the debtor to
19 afford itself of its opportunities under
20 the lease. The -- that amount was, as
21 Your Honor will recall, paid. In March,
22 last week, actually, the umbrella and
23 excess insurance policies that the
24 landlord maintains were renewed. The
25 lease provides that not less than twenty

1 EAST 44TH REALTY, LLC
2 days before that renewal, if the debtor
3 wishes to or if the tenant wishes to, it
4 can deliver to the landlord fully paid
5 copies of insurance policies that it
6 proposes to offer as replacement and
7 umbrella insurance. The debtor did not
8 do that. That day came and went. It was
9 February 14th. Happy Valentines Day,
10 everyone. On February 17, I bound the
11 renewal, effective March 6 of the
12 existing and renewing excess in umbrella
13 insurance. I submitted to the debtor the
14 broker's invoice. It's approximately
15 54,450 dollars asking to be reimbursed.
16 As of this moment, we've not been
17 reimbursed. What we've been told is that
18 the debtor has gone out and bought other
19 coverage. That other coverage is not
20 compliant with the lease for -- on
21 several reasons and simply on its face.
22 It doesn't even require exhaustive
23 analysis. It doesn't name the proper
24 insured, it doesn't name the landlord at
25 all as an insured. It's inadequate in

1 EAST 44TH REALTY, LLC
2 the amounts and what they've done is
3 rather than buy excess or umbrella
4 coverage over the existing primary
5 insurance, they've gone out and bought a
6 totally separate primary coverage which
7 is in and of itself wholly inadequate.
8 So, they've literally refused, despite
9 Your Honor's orders, to reimburse us and
10 we'd like to be reimbursed. It's 54,450
11 dollars due under the lease. Paragraph
12 10 makes it clear as a matter of fact and
13 a matter of law that it has to be
14 reimbursed. The debtor had, if it had a
15 lease at all, and we understand Your
16 Honor's determination, it had until
17 February 14 to propose --

18 THE COURT: Okay. All right. This
19 is not really teed up in front of me -- I
20 mean, I appreciate you alerting me to
21 this, but is this in dispute?

22 MS. Trakinski: Can I -- I have to
23 address it, Judge.

24 MR. TOFEL: Excuse me. It is --
25 let me, please.

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2 THE COURT: No, I mean, the facts
3 aren't in front of -- I mean, it's just
4 two lawyers talking. It's -- you know

5 MS. TRAKINSKI: Well, Judge, I have
6 the facts to hand out --

7 MR. TOFEL: No, it's not two
8 lawyers talking. Your Honor has issued
9 orders --

10 THE COURT: No, no. This part is
11 two lawyers talking. I don't have -- I'm
12 not going to sit here now and parse
13 through what the lease requires. That's
14 all I'm saying.

15 MR. TOFEL: Your Honor has already
16 ruled what the lease requires.

17 THE COURT: No, no, no. You don't
18 understand what I'm saying. I appreciate
19 what you're telling me. The debtor's
20 lawyer is standing and I guess she wants
21 to tell me something different.

22 MS. TRAKINSKI: I just --

23 THE COURT: But ultimately it's
24 just two lawyers talking. I understand I
25 told him to pay the insurance, but if

1 EAST 44TH REALTY, LLC

2 they have some other way of paying the
3 insurance -- I mean, I don't know. What
4 do you have to say?

5 MS. TRAKINSKI: We paid the
6 insurance. Paragraph 10 of the lease.
7 You can sit down, Larry, and let me speak
8 now. Paragraph 10 of the lease provides
9 the tenant shall insure the building.
10 And there's a phrase the tenant shall
11 procure, the tenant shall pay over and
12 over again. So, first of all, paragraph
13 10 does not require the landlord to buy
14 insurance and the tenant to pay, number
15 one.

16 THE COURT: But are there --

17 MS. TRAKINSKI: Number two, Mr.
18 Bildirici gave the landlord more than 28
19 months to review the proposed insurance
20 that he had had designed by an insurance
21 broker, several people reviewed the
22 lease, he's been given absolute assurance
23 that what he's purchased and his purchase
24 -- a binder was delivered to the landlord
25 that does --

1 EAST 44TH REALTY, LLC

2 THE COURT: Within the time frames
3 that the lease requires?

4 MS. TRAKINSKI: The binder, the
5 binder -- yes.

6 MR. TOFEL: Excuse me.

7 THE COURT: Well, wait. No, no.
8 Look.

9 MS. TRAKINSKI: Larry, please.

10 THE COURT: There are two people --
11 one thing about lawyers that I do accept
12 is that they have an obligation to at
13 least tell me something that they believe
14 in good faith is accurate. Once they do
15 that, and once they're saying two
16 different things, I can't decide it on
17 the fly. You know, Judge McKelvey, one
18 of his favorite movies was the movie
19 Diner. You remember that movie?

20 MS. TRAKINSKI: Yes.

21 THE COURT: It's a real good movie.
22 It's all about a bunch of people sitting
23 around talking. It's a great movie but
24 it wouldn't be a good trial because
25 they're just talking. And that's what

1 EAST 44TH REALTY, LLC

2 this is, is people talking. If there's a
3 dispute that two lawyers are telling me
4 is a legitimate dispute, it has to be
5 teed up in front of me so I can actually
6 decide it.

7 MR. BACKENROTH: We'd like to
8 opportunity to respond to such a thing as
9 well.

10 MR. TOFEL: I appreciate what Your
11 Honor is saying; however, it does not
12 take a rocket scientist to look at a
13 calendar --

14 THE COURT: All right. So, tee it
15 up promptly, that's all. Maybe you're
16 right. If you're right, then it's a real
17 big strike against the debtor, because
18 it's -- I think that maybe they're being,
19 generally, intransigent. On the other
20 hand, if you're wrong, you're wrong.
21 But, tee it properly -- if it's really
22 simple to understand, just tee it up very
23 quickly. I'll decide it.

24 MR. TOFEL: We will do that.

25 THE COURT: Okay.

1 EAST 44TH REALTY, LLC

2 MR. TOFEL: The other issue is
3 continued use of cash. And I want to
4 deal with that very directly and then
5 Your Honor can maybe give us guidance.
6 And then I have a request or a proposal
7 for how we move forward over the next
8 days, weeks and months. Your Honor ruled
9 in January that the debtor's use of cash
10 would continue through some date in
11 February. It hasn't renewed since then.
12 Be that as it may --

13 THE COURT: Is there an extant
14 order? Is there an order, a cash
15 collateral order?

16 MR. TOFEL: No. No. The debtor
17 has operated for the last month without
18 permitted use of cash. That's not the
19 issue. The issue, interestingly enough,
20 is that on January 18, Your Honor was
21 very clear in continuing cash and Your
22 Honor made specific rulings that part of
23 what was motivating the Court's
24 determination was that the debtor had
25 been represented to Your Honor that it

1 EAST 44TH REALTY, LLC
2 had not for some time and would not,
3 prospectively, and Your Honor made it
4 clear, that the debtor could not pay its
5 management fee going forward. Although
6 we don't have any information with
7 respect to the month of February. That
8 is, the March operating reports haven't
9 been filed and the debtor has yet once
10 again failed to provide us with a level
11 of detail or anything about February that
12 Your Honor has previously ordered. The
13 February operating report for the month
14 of January shows that, contrary to Your
15 Honor's ruling, the management fee is
16 being paid. Again, we think it's a clear
17 violation of Your Honor's ruling --

18 THE COURT: Well, didn't -- I
19 thought there was a portion of the
20 management fee that could be paid, which
21 was --

22 MR. BACKENROTH: That's right.

23 MR. TOFEL: No.

24 THE COURT: -- their sort of bread
25 and butter employees, and that the

1 EAST 44TH REALTY, LLC
2 management fee that goes to Mr. Bildirici
3 was going to be escrowed or something to
4 that effect?

5 MR. BACKENROTH: He had the right,
6 exactly. But direct expenses as opposed
7 to the profit or however you want to
8 characterize it --

9 MR. TOFEL: Right. Your Honor said
10 on January 18 on page 36, beginning at
11 line 14, and I'm quoting, As I understand
12 it, the debtor has not been paying any
13 management fee to its insider for at
14 least a couple months --

15 THE COURT: Yeah, to the insider.

16 MR. TOFEL: The insider.

17 THE COURT: Yeah.

18 MR. TOFEL: No, the management fee
19 that is paid goes to B&F Imports. That
20 is the insider. What we are talking
21 about -- let me go back. There was -- if
22 Your Honor referred to there was a six
23 percent fee and Your Honor directed that
24 one percent or one-sixth of that go into
25 escrow. We're talking about now not just

1 EAST 44TH REALTY, LLC

2 the one percent, but the five percent --
3 the total six percent. And Your Honor
4 said --

5 THE COURT: That's not what I was
6 talking about. I was talking about the
7 money that really went to the insider,
8 Bildirici. The other people I thought
9 you didn't have a problem with because
10 they were the people, that was the
11 bookkeeper, and the person that checked
12 on the tenants --

13 MR. TOFEL: No, Judge.

14 THE COURT: -- the ordinary -- the
15 ordinary Joes.

16 MR. TOFEL: Your Honor did not
17 distinguish --

18 THE COURT: Because we weren't
19 talking about that.

20 MR. TOFEL: Yes, we were.

21 MS. TRAKINSKI: Judge, if he thinks
22 we're in violation of the order he should
23 tee this one up, too.

24 THE COURT: Well, all right. Well,
25 no, what really should be done is the

1 EAST 44TH REALTY, LLC
2 debtor should tee up a request for use of
3 cash collateral because the order is --
4 I'm not comfortable proceeding on just
5 matters that are stated on the record
6 about continuation of cash collateral.

7 MS. TRAKINSKI: We'll take care of
8 that early next -- by the beginning of
9 next week, Judge.

10 THE COURT: Okay.

11 MR. TOFEL: The last issue that I
12 would propose, Your Honor obviously
13 envisions or either now agreement between
14 the parties or further discovery. It
15 won't come as a surprise to you that we
16 respectfully disagree with Your Honor's
17 ruling on what we've referred to
18 colloquially as the gating issue. I do
19 believe and we have to consider whether
20 we're going to seek review of that. My
21 question for Your Honor would be whether
22 we can agree or whether Your Honor would
23 entertain coming to an agreement on
24 continued use of cash very much
25 consistent with prior budgets as Your

1 EAST 44TH REALTY, LLC

2 Honor has ruled that we defer for a brief
3 period of time the issue which is going
4 to require a great deal of lawyer's time
5 on the issue of cure amounts and things
6 of that ilk until we both either
7 determine whether we're going to seek
8 review and obtain that review.

9 THE COURT: Well, that's -- I
10 haven't -- this isn't an order. This is
11 for the parties' convenience. I've
12 staged this this way. But there's only
13 one order that I'm going to issue, which
14 is an order granting assumption or
15 rejection or not.

16 MR. TOFEL: Well, Your Honor had
17 before you a motion to lift stay under
18 paragraph 24 of the lease and allow us to
19 collect sublease proceeds and that teed
20 up as Your Honor will recall the issue of
21 lease termination.

22 THE COURT: Well, I guess I can --
23 you're right, I can rule on that.

24 MR. TOFEL: I think Your Honor has.

25 MS. TRAKINSKI: Yeah.

1 EAST 44TH REALTY, LLC

2 MR. TOFEL: As we understand it,

3 Your Honor --

4 THE COURT: No, I mean, I can issue
5 an order on that. That's fine. It's an
6 interlocutory order, but I can issue it.
7 I had forgotten that you had separately,
8 in addition to in your objection to the
9 motion, you had, I remember, separately
10 made your lift/stay motion.

11 MS. LIU: Are you saying it's
12 interlocutory, Your Honor? Because
13 you're saying that maybe after you hear
14 all the cure amount-related testimony.

15 THE COURT: No, it's a motion for
16 relief from the automatic stay.

17 MS. LIU: -- you may decide to not
18 allow the assumption of the lease? Is
19 that why? Because otherwise you've
20 ruled.

21 THE COURT: No, I had -- Mr. Tofel
22 had reminded me that there was a separate
23 motion for relief from the automatic stay
24 for lack of adequate protection and the
25 like. I think that given the analysis

1 EAST 44TH REALTY, LLC
2 that I have to do on a lift/stay motion
3 it is interlocutory. It does decide one
4 issue in that context. But that's a
5 separate -- I'm not talking about the
6 motion to assume.

7 MS. LIU: Okay. You were talking
8 about that motion but I guess my question
9 to you now is you've made a ruling on the
10 law and the facts and the law that the
11 lease did not terminate --

12 THE COURT: Just as a matter of
13 staging this -- the handling of this
14 trial.

15 MS. LIU: Okay. And then you're
16 saying, when you hear the rest you'll
17 make your final determination on whether
18 --

19 THE COURT: Right. As to whether
20 it can be assumed or not.

21 MS. LIU: --the lease is assumable
22 or not. But didn't you separately
23 already decide it hasn't been terminated?

24 THE COURT: Yes.

25 MS. LIU: Okay. But you don't see

1 EAST 44TH REALTY, LLC

2 that as a separate --

3 THE COURT: It's all in the context
4 of a motion to assume. So, I don't think
5 so.

6 MS. TRAKINSKI: But there's no
7 separate motion on the issue.

8 MR. BACKENROTH: It's
9 interlocutory.

10 THE COURT: There is no request for
11 declaratory judgment. It's just to
12 really to give all the parties, as I
13 think they had sought, a way to handle
14 this matter efficiently. But Mr. Tofel's
15 right. There was a separate motion.

16 I'll go back and look at that. If this
17 equally -- if my determination as to
18 termination or not, which I dealt with
19 today, applies to that motion, and I
20 think it probably does as I remember that
21 motion now, I'll issue an order on that.

22 MR. TOFEL: Thank you, Judge.

23 THE COURT: All right. I guess you
24 all have to get the time records and work
25 out a discovery schedule. I don't know

1 EAST 44TH REALTY, LLC

2 if you're going to take anyone's
3 deposition besides Mr. Tofel's.

4 MS. LIU: Oh, yes. We will, Your
5 Honor.

6 THE COURT: All right. So, I think
7 for now -- well, you're going to be
8 making a motion for continued use of cash
9 collateral. I will adjourn this hearing
10 or continue this hearing to that date
11 which should definitely be within the
12 next few weeks.

13 MS. LIU: Can I just mention a
14 scheduling difficulty? We've previously
15 accommodated Ms. Trakinski's vacation and
16 I guess it's now my turn. I was going to
17 be away between March 22 to March 31.

18 THE COURT: Okay.

19 MS. TRAKINSKI: No problem.

20 MR. BACKENROTH: That period of
21 time is difficult for me, too, so that's
22 --

23 MS. LIU: And I have a --

24 THE COURT: Why don't you all work
25 out, you can work out -- maybe this

1 EAST 44TH REALTY, LLC

2 would be a good thing. You can work out
3 the schedule among yourselves. Maybe
4 that would be an initial step to perhaps
5 trying to work together.

6 MS. TRAKINSKI: We're not looking
7 to inconvenience anybody, Judge.

8 MR. BACKENROTH: Yeah.

9 THE COURT: Okay. All right. The
10 last thing I'll say which I guess I just
11 alluded to is I understand that the
12 landlord has hotly asserted over the
13 course of proceedings both in state court
14 and here for a number of months its view
15 that the lease terminated. And it's
16 certainly entitled to continue to pursue
17 that issue. On the other hand, knowing
18 now that it would do it on an appellate
19 level and knowing also, sort of
20 generally, how I view the attorneys' fee
21 issue, and I think, frankly, the Best
22 Products and Nicfur cases are pretty
23 instructive there, as well as Judge
24 Walrath's case in Crown, in light
25 ultimately of the underlying cure costs,

1 EAST 44TH REALTY, LLC
2 separate and apart from the attorneys'
3 fees being what I think everyone would
4 agree is relatively a small amount of
5 money, I would strongly urge the parties
6 to try to resolve this. One aspect of
7 that resolution in my mind clearly is
8 adequate assurance of future performance,
9 and I think one element that the
10 landlord's fully entitled to is assurance
11 that the lease will continue to be
12 performed. But I have a hard time seeing
13 at this point continually mounting
14 attorneys' fees to terminate this lease
15 when the ultimate expense in respect of
16 the building is relatively small. I
17 don't know whether an appellate court
18 would agree with me, but it just seems to
19 me to be contrary to the general policy
20 under New York law as certainly clearly
21 well under the bankruptcy law to keep
22 doing this. And so, I would really urge
23 the parties to try to reach a reasonable
24 settlement here. One thing's clear to me
25 is that this being America, the landlord

1 EAST 44TH REALTY, LLC
2 does have the right to continue to
3 litigate. And I don't think its position
4 is frivolous, by any means. So the
5 debtor is going to continue to be out its
6 attorneys' fees, as well as having the
7 risk, of course, that some material
8 portion of what the landlord is seeking
9 is going to be paid, too. So, I think
10 there's a reason for the parties to get
11 over what has clearly been separating
12 them for the last several months and try
13 to resolve this. And I would really urge
14 them to do so. If they think there is a
15 basis for doing so that would be
16 materially furthered by a mediator, I'm
17 happy to appoint a mediator and direct
18 mediation. There clearly are some very
19 strong personalities here and I think
20 that's on the client level, too, although
21 maybe it's -- maybe strong may not be so
22 much the word as frustrating and a
23 mediator may be helpful there, including
24 to deal with people at the client level.
25 So, I would urge you all to consider

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1 EAST 44TH REALTY, LLC

2 that, too, and let me know about that.

3 Okay.

4 MR. TOFEL: Thank you, Your Honor.

5 MS. TRAKINSKI: Thank you, Judge.

6 (Whereupon this proceeding was
7 concluded.)

8 (Time noted: 11:40 a.m.)

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7 transcription in the matter of the bankruptcy
8 hearing for except, where as indicated, the Court
9 has modified its bench ruling:

10 EAST 44TH REALTY, LLC.

11 I further certify that I am not employed
12 by nor related to any party to this action.

13

14 In witness whereof, I hereby sign this
15 date:

16 March 13, 2006.

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19 Lisa Bar-Leib

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